

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

**LYLE QUICK, ET AL.,
RESPONDENTS
vs.**

**FRANKLIN ANDERSON, ET AL.,
APPELLANTS**

DOCKET NUMBER WD79176

DATE: AUGUST 23, 2016

Appeal from:

The Circuit Court of Johnson County, Missouri
The Honorable Robert M. Liston, Judge

Appellate Judges:

Division Three: Victor C. Howard, Presiding Judge, Lisa White Hardwick, Judge and Gary D. Witt, Judge

Attorneys:

Gayle E. McVay, for Respondents
J. Kirk Rahm, for Respondents

Jonathan Sternberg, for Appellants

MISSOURI APPELLATE COURT OPINION SUMMARY

MISSOURI COURT OF APPEALS WESTERN DISTRICT

LYLE QUICK, ET AL., RESPONDENTS

v.

FRANKLIN ANDERSON, ET AL., APPELLANTS

WD79176

Johnson County, Missouri

Before Division Three: Victor C. Howard, Presiding Judge, Lisa White Hardwick, Judge and Gary D. Witt, Judge

This appeal arises from the summary judgment in a will contest declaring that the decedent, Bertha Don Carlos, died intestate. A purported August 2007 will that was admitted to probate by the probate division was challenged by decedent's daughter, niece, and nephews. A counterclaim was filed in the will contest by decedent's sister-in-law and her children praying that should the court find the August 2007 will invalid, it should admit a purported 1991 will that had been rejected by the probate division. The decedent's other nephew and his three children answered the counterclaim admitting all of the allegations. The trial court entered partial summary judgment finding that the counterclaim contesting the rejection of the 1991 will was untimely. After the parties stipulated that the August 2007 instrument was not the last will and testament of the decedent, the trial court entered summary judgment finding that because no other purported wills were before the court, the decedent died intestate. The judgment is affirmed.

AFFIRMED.

Division Three holds:

- (1) Under section 512.020(5), an appellant is not compelled to immediately appeal an interlocutory judgment designated as final by the trial court under Rule 74.01(b) but may have the action of the trial court reviewed on an appeal taken from the final judgment in the case.
- (2) Where the counterclaim contesting the rejection of the purported 1991 will was not filed within six months after the rejection of the will by the probate division, the rejection of the 1991 will was binding under section 473.083.1, the statute of limitations for will contests. The counterclaim was not saved (or tolled) as a recoupment because it was not purely defensive but affirmatively sought probate of the 1991 will and section 473.083.1 is a special statute of limitations and does not expressly or impliedly authorize the time for contesting a will based on a recoupment theory. The trial court did not err in entering partial summary judgment finding the counterclaim untimely.
- (3) Where the probate division had not admitted or rejected purported February 2007 and 2003 wills and the parties' petitions, answers, and counterclaim in the will contest raised only the August 2007 and the 1991 wills, the purported February 2007 and 2003 wills were not at issue in the will contest. The trial court, therefore, did not err in entering summary judgment finding that the decedent died intestate.

Opinion by: Victor C. Howard, Judge

Date: August 23, 2016

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